Supreme Court, U.S.
FILED
APR 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87 - 1550

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WILLIAM DERR,
Petitioner,

v.

KAWASAKI KISEN K.K.,
Respondent.

THOMAS ROBERTSON,
Petitioner,

v.

TOKAI SHOSEN K.K.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

REPLY TO JOINT BRIEF IN OPPOSITION

CHARLES SOVEL
FREEDMAN and LORRY, P. C.
Attorneys for Petitioners
800 Lafayette Building
5th and Chestnut Streets
Philadelphia, PA 19106
(215) 925-8400

TABLE OF AUTHORITIES

	PAGE
CASES:	
Gill v. Hango Ship-Owners/AB 682 F. 2d 1070 (4th Cir. 1982)	4, 5 8, 9
Harris v. Flota Mercante Grancolombiana, S.A. 730 F.2d 296 (5th Cir. 1984)	8, 9
Lemon v. Bank Lines, Ltd. 656 F.2d 110 (5th Cir. 1981)	6
Scindia Steam Navigation Co. v. De Los Santos 451 U.S. 156, 81 L.Ed.2d 1 (1981)	2, 3 8
Taylor v. Moram Agencies 739 F.2d 1384 (9th Cir. 1984)	2
Turner v. Japan Lines, Ltd. 651 F.2d 1300 (9th Cir. 1981), cert. denied 459 U.S. 967, 74 L.Ed.2d 278 (1982)	2, 3 5

No. 87 - 1550

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WILLIAM DERR,
Petitioner,

v.

KAWASAKI KISEN K.K.,
Respondent.

THOMAS ROBERTSON,
Petitioner,

v.

TOKAI SHOSEN K.K.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

REPLY TO JOINT BRIEF IN OPPOSITION

Respondents would have this Court believe that there is no conflict between the decision below and the cases from the Fourth, Fifth and Ninth Circuit cited in

the Petition, despite the fact that both the trial judge in Robertson (89a-90a) and the Third Circuit (11a) acknowledged that there was a conflict.

Respondents attempt to distinguish Turner v. Japan Lines, Ltd., 651 F.2d 1300 (9th Cir. 1981), cert. denied, 459 U.S. 967, 74 L.Ed.2d 278 (1982), on the ground that the dangerous condition in Turner was "concealed", whereas, in the instant cases, the shifted condition of the cargo was "open and obvious". This factual difference, however, does not relate to the shipowner's duty of inspection; rather, it goes to the argument which was rejected in Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 178-179, 81 L.Ed.2d 1, 19-20 (1981), that the shipowner's duty of reasonable care should be limited to the giving of warning of an unsafe condition.

Taylor v. Moram Agencies, 739 F.2d

1384 (9th Cir. 1984), did not limit the Turner holding on the duty of inspection. Rather, it held that, in those situations in which the vessel's duty of care could be fulfilled by the giving of a warning, it would not be necessary for the vessel to give a separate warning if the unsafe condition was obvious, see 739 F.2d at 1387.

This Court, in Scindia, rejected the argument that the shipowner's duty should be limited to only having to give warning of an unsafe condition, and, instead, held that the vessel would have a duty to take corrective action if the circumstances were such that the vessel knew or should have known that the longshoreman's stevedore employer was not taking action to remedy an unsafe condition, Scindia, supra, 451 U.S. at 172-179, 68 L.Ed.2d at 16-20. This part of the Scindia holding gives rise to what is a recurring problem

in cases, such as the two instant cases, which involve the shifting of cargo as a result of improper stowage.

It is not possible for a discharging stevedore to "unshift" cargo which has shifted without being imperiled by the same dangers as would be encountered in discharging that cargo. If, as frequently is the case with shifted cargo, the danger is one which the unloading stevedore can not remedy, then the shipowner can not validly claim that it was relying on the unloading stevedore to correct that condition. In these circumstances, the giving of warning, or the fact that the condition was "open and obvious", does not satisfy the duty of reasonable care. This type of situation was before the Fourth Circuit, in Gill v. Hango Ship-Owners/AB, 682 F. 2d 1070 (4th Cir. 1982), with the Court holding that the shipowner would be liable for unsafe stowage, even if open and obvious,

if the danger was one which the shipowner could not reasonably have anticipated that the unloading stevedore would be able to avoid. The Fourth Circuit noted, 682 F.2d at 1074-1075:

> There is evidence that the manner in which the cargo was stored precluded the stevedore from unloading it by any other means except one which was inherently dangerous. If so, this is not a case in which the stevedore failed to use reasonable care but, in effect, one in which the shipowner was the only party at fault. In other words, the jury could reasonably find that Hango should have anticipated the harm because the stevedore was unable to remedy the dangerous condition (Emphasis supplied)

Respondents effort to distinguish Turner on the grounds that it involved a concealed defect thus serves only to demonstrate an additional conflict between the decision below and the Fourth Circuit's decision in Gill.[1]

---

1. Respondents also assert that the Third Circuit distinguished Derr and Robertson from Turner on their facts in that "unlike Turner", Derr and Robertson "presented no evidence that

Respondents contention that the Fifth Circuit's decision in Lemon v. Bank Lines, Ltd., 657 F.2d 110 (5th Cir. 1981), is

(Footnote 1 continued)

> the vessel owner exercised any control or supervision over the loading . . ." [of the cargo]. However, respondents do not point to where, in the Turner opinion the Ninth Circuit found that the shipowner in that case had exercised control or supervision over the loading, and one will search in vain in the Turner opinion for any indication that this was, in fact, the case. Rather, the evidence in Turner, as in the instant two cases, was that the cargo had been loaded and lashed by independent stevedores, see Turner, supra, 651 F.2d at 1301.
>
> Respondents assertion that there was no evidence in the instant cases of "any custom at the respective loading ports which would have required the Masters or crew to be responsible for supervising cargo operations." This is a misstatement of the record below. On the contrary, there was specific testimony by petitioner's maritime expert in the Derr case of such a custom or practice -- testimony which was similar to that offered on behalf of the plaintiff in Turner. The problem in the instant case is not the lack of such testimony, but rather that the trial judge, in Derr, rejected this testimony, thereby creating one of the conflicts which is the subject of the instant Petition (8a-9a, 25a).

distinguishable because, in the instant two cases, there was no evidence that the shipowner had "actual notice of any improper loading technique," is contradicted by the record in the instant cases. In Derr, there was evidence of the practice of the crew to observe loading operations (41a), and in Robertson there likewise was evidence of inspections by the ship's crew (15a-16a), evidence from which the juries could have found that the shipowner should have been aware that the cargo had not been adequately secured.

Respondents next contend that the legislative history precludes imposing liability on shipowners for unsafe conditions which are created in a manner other than by the shipowner's own active negligence. Respondents wrongly characterize such liability as a form of "vicarious" liability when, in fact, it simply is liability for one's own negligence arising

from breach of the duty of inspection.

Respondents' interpretation of the legislative history would eliminate vessel responsibility for any unsafe condition not resulting from the shipowners own active negligence, thereby eliminating all liability arising from a duty of inspection. Such an interpretation is contrary to this Court's decision in Scindia, supra, which recognized and defined the shipowner's duty of inspection, see 451 U.S. at 166-172, 68 L.Ed.2d 12-15, and would be contrary to the intent of Congress to retain vessel responsibility for unsafe conditions which were in existence long enough to have been discovered and removed by the vessel (100a-101a).

Respondents' effort to distinguish the decisions in Harris v. Flota Mercante Grancolombiana, S.A., 730 F.2d 296 (5th Cir. 1984), and Gill v. Hango Ship-Owners/AB, supra, on the grounds that in

those cases there was active involvement of the crew in the loading operation is not borne out by the opinions in those cases. There is no indication in either the Harris or Gill opinions that the crews in those cases actively participated in loading the cargo. In Harris there simply was no evidence that the cargo had been loaded by an independent stevedore, see 730 F.2d at 299, f.n. 2. The vessel's liability in Harris was predicated on the vessel's knowledge of the unsafe condition of the cargo, not on any claimed active involvement of the crew in loading the cargo, see 730 F.2d at 299. In Gill there was no evidence one way or the other as to who loaded the cargo.

The various arguments set forth in the Joint Brief in Opposition do not negate the existence of the conflicts between the decision below and the cited decisions from the Fourth, Fifth and Ninth

Circuits. Respondents' efforts to distinguish the cases from the other Circuits serve only to emphasize how deep and real is the conflict, and how far the court below has strayed from this Court's decision in Scindia and from the decisions of the other Circuit Courts of Appeals in the cases cited in the Petition. Accordingly, it is respectfully submitted that a Writ of Certiorari should issue so that these conflicts may be resolved and national uniformity restored to the maritime law.

Respectfully submitted

CHARLES SOVEL
FREEDMAN AND LORRY, P.C.
Attorneys for Petitioners